plea of absence of *mens rea* or by proving that he did not know of them.

In this case the prosecution had the means of obtaining the original permit and producing it in Court, and they should have done so; they could not use the provision of sec. 65, Evidence Ordinance, governing secondary evidence, as they did not apply in this case. They have not therefore proved what the conditions attached to the permit covering J. 5752 are, and therefore there is no legal proof that the conditions were not observed by accused.

It may be argued that the improper admission of the certified copy of the permit is curable under the provisions of sec. 168, Evidence Ordinance, and sec. 422 of the Criminal Procedure Code, but on examination of the evidence it is clear that, if the evidence of the terms of the permit is excluded as being improperly admitted, the prosecution case must fail and the accused has nothing to answer. It cannot be said that, excluding the improperly admitted certified copy of the permit, there is sufficient other evidence adduced by the prosecution on which the Court could have convicted, since the *corpus delicti* was the number of passengers permitted and this could not be ascertained without the permit itself. The *ratio decidendi* in *R. v. Tay Choon Huat* (Singapore Magistrate's Appeal No. 89/47) cited in the commentary on sec. 448 of the Cr. Pro. Code of Singapore which is the same as sec. 422 of the Cr. Pro. Code of the Federation of Malaya, applies equally well to this case.

The appeal will be allowed and the conviction and sentence set aside and the fine, if paid, will be refunded.

Appeal Allowed.

ISMAIL BIN HAJI IBRAHIM v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J., Pretheroe and Russell, JJ.) May 7, 1949]
[F.M. — Criminal Appeal No. 43 of 1949]

Emergency Regulations 1948 S. 4(1)(a) — Charge of carrying a firearm — Proof that firearm is serviceable — Discrepancy between statement of witness in police investigation and evidence given at trial — Failure to direct assessors on this discrepancy.

In this case the appellant had been convicted on a charge of carrying a firearm, to wit, a pistol, an offence contrary to Regulation 4(1)(a) of the Emergency Regulations, 1948. The evidence given at the trial was to the effect that appellant had visited a headman, took out a pistol and placed it on his lap. The headman described the pistol as made of steel and black in colour. His wife, who also gave evidence, said she saw a black pistol in the appellant's hand. Both the headman and his wife were kampong Malays and not acquainted with firearms. The pistol was not produced at the trial. A statement made by the wife of the headman during the police investigation was put in evidence at the trial. In it she is recorded as saying that the appellant pointed "a gun — probably a Sten gun" at her husband.

Held, (1) that the learned trial Judge should have directed the assessors to the fact that both the headman and his wife were kampong Malays not proved to be acquainted with firearms and warned them that they should bear this particular point in mind when considering their evidence regarding the firearm; (2) that the learned trial Judge had in this case failed to direct the assessors on the important inconsistency between the statement made by the wife of the headman in the police investigation and her evidence at the trial; (3) that it was impossible to say that if the assessors had been directed on this point, they would have come to the same conclusion and therefore the conviction must be quashed.

Case referred to :—

(1) *Chong Kim Seng v. Public Prosecutor* (1949) M.L.J. 109.

CRIMINAL APPEAL.

E. E. C. Thuraisingham for the Appellant.

M. Suffian for the Respondent.

The judgment of the Court of Appeal was delivered by :—

Willan, C. J. : — In this case the appellant was charged with carrying a firearm, to wit a pistol, an offence contrary to Regulation 4(1) (a) of the Emergency Regulations, 1948. He was convicted and sentenced to death.

On the 5th of August 1948, according to the prosecution, the appellant and another Malay went to the house of one Mohamed Taib at about 2 p.m. That house is in the village of Kampong Paya Luas, and Mohamed Taib, at that time, was the headman of the village. He and his wife lived in the house. The other Malay, who went to the house with the appellant, was not traced after this incident, and the appellant was unable to call him as a witness at the trial.

Mohamed Taib's evidence is that after entering the house the appellant took a pistol out of his right hand trouser pocket and placed it on his, the appellant's, lap. The appellant then warned Mohamed Taib not to pay any revenue to Government and threatened that if he, Mohamed Taib, went to the Land Office or to the police station the appellant would have him arrested. After this the appellant and the other Malay (untraced) went away. During the whole of the conversation the pistol remained on the lap of the appellant. When he went away he picked up the pistol from his lap and took it away with him. The pistol has not been seen since.

Mohamed Taib described this pistol as made of steel, black in colour. He said he did not know the

difference between a revolver and an automatic pistol, but stated that the pistol in question "was a straight one without the round thing that turns". He said it was not a dummy because it was made of steel.

The evidence of Mohamed Taib's wife is that she saw a pistol in the appellant's hand — that it was black. She indicated its length — about the length of a .38 revolver. She said she recognised it as a pistol from its barrel, which was made of steel.

She was cross-examined on a statement she made during the police investigation on the 23rd August, 1948. That statement forms part of the appeal record, and in it she is recorded as saying that the appellant pointed "a gun — probably a Sten-gun" at her husband. We deal later in this judgment with this discrepancy between her evidence at the trial and that part of her statement to the police.

The appellant gave evidence in his own defence. He denied ever having had a pistol and stated that this case was a "frame-up" by Mohamed Taib because he, the appellant, had informed against Mohamed Taib's brother to the Japanese during the occupation.

An important point of law is raised in this appeal. The original charge against the appellant was that he was carrying component parts of a pistol, to wit a barrel and trigger. According to the prosecution the reason why the charge was originally framed in that way was because the wife of Mohamed Taib could only testify that those were the actual parts of a pistol she saw in the hand of the appellant. At the end of the case for the prosecution the learned trial Judge amended the charge to one of carrying a whole firearm, and that is the charge on which the appellant was convicted.

Mr. Thuraisingham, for the appellant, submitted that the conviction could not stand because there is no proof that the pistol was capable of discharging "any shot, bullet or other missile". He cited the case of *Chong Kim Seng v. P. P.*[1]. In that appeal the facts were that the appellant was found in possession of 34 rounds of ammunition, which were put in as an exhibit at the trial. On the question as to whether it was necessary for the prosecution to prove that this ammunition was "serviceable", the Court of Appeal decided the negative. In coming to that decision the Court of Appeal contrasted the definition of "ammunition" with that of "firearm" in the Emergency Regulations, 1948. In doing that the Court said :—

> We are fortified in this view by a comparison with the first part of the definition of "firearm" in the same Regulation. The first part of that definition reads:—
>
> '"Firearm" means any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged.....'
>
> That part of the definition of "firearm" places the onus on the prosecution of proving that the firearm is serviceable, but no such onus is cast upon the prosecution in the definition of 'ammunition'.

Although that judgment is only an authority that the prosecution need not prove ammunition to be serviceable under the Emergency Regulations, 1948, it is the last part of that passage in the judgment on which Mr. Thuraisingham relies.

The definition of "firearm" in the Emergency Regulations, 1948, reads :—

> "Firearm" means any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged or which can be adapted for the discharge of any such shot, bullet or other missile and any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing, and includes any component part of any such weapon as aforesaid.

Dealing with the first part of the definition which reads :—

> "Firearm" means any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged.....,

there is no difficulty when the firearm is recovered. The difficulty arises when the firearm is not recovered.

In all cases which have come before the Courts where the firearm has been recovered it has been the practice to call evidence that the police had tested the firearm by firing it and that it could discharge a bullet, or, if it could not, that it could be adapted to do so. In our view this practice should continue.

Owing to this practice it appears to have been thought that in any case in which the firearm is not recovered it is impossible to prove it to be a firearm which "can discharge a shot, bullet or other missile", and therefore in such cases the charge should be one of carrying or possessing component parts of a firearm. In our view this is wrong.

If a witness sees a person holding a rifle, or a pistol, that witness will give evidence that he saw a person holding a rifle or pistol, as the case may be, and not that he saw him holding a barrel and any other parts he could specifically see.

The question of whether a particular rifle or other firearm can discharge a shot or bullet is a matter of evidence in each particular case, and in approaching that question it should be borne in mind that a rifle, pistol or any other barrelled firearm is designed and manufactured for that particular purpose.

If, for instance, the prosecution evidence is that witnesses sufficiently acquainted with firearms say that

the accused was carrying a revolver, and they describe it to be a revolver of a particular type or manufacture, and that evidence is believed, it would be proper to convict that accused on that evidence in a case in which the revolver was not recovered. Even if there was doubt on the question of that revolver being capable of discharging a bullet at the time when the accused was seen by the prosecution witnesses to be carrying it, again it would be proper for the Assessors and the trial Judge, giving due regard to any evidence to the contrary, to come to the conclusion that the revolver could be adapted to discharge a bullet, and thus bring it within the definition of "firearm" as defined in the Emergency Regulations, 1948.

It is impossible to lay down the standard of evidence required. It must depend on the circumstances of each particular case. The example I have just given is one in which the witnesses are sufficiently acquainted with firearms. In others the witnesses may be kampong people — they are kampong Malays in this case — whose knowledge of firearms is very limited.

We have examined the Court of Appeal records relating to the carrying and possession of firearms. In only two appeals has this Court confirmed convictions where the appellant was charged with being in possession of component parts of a firearm. In each of those cases there was definite evidence that the appellant was in possession of the whole of a specific type of firearm.

In the first case the principal witness for the prosecution gave evidence that the appellant was in possession of a Sten-gun, and stated that the Sten-gun possessed was like a Sten-gun produced in Court for comparison. He went on to give evidence that he was well acquainted with Sten-guns himself and had used them.

In the other case a Special Constable identified the weapon in the possession of the appellant as a .303 Mark VII rifle.

We cite these two cases because they are examples of the type of cases where, although the firearm was not recovered, witnesses, sufficiently acquainted with firearms, gave evidence identifying the particular firearm in the possession of the accused.

We hold that the learned trial Judge was correct in amending the charge in this case from one of carrying component parts of a firearm to one of carrying a whole firearm.

In the present case both Mohamed Taib and his wife are kampong Malays not proved to be acquainted with firearms, and the Assessors were not warned to consider their evidence bearing this particular point in mind.

We now revert to the discrepancy referred to earlier in this judgment, between the evidence of the wife of Mohamed Taib at the trial and her statement in the police investigation.

In his summing-up the learned trial Judge read to the Assessors a passage from her statement in the police investigation, including the part in which she said the appellant pointed "a gun — probably a Sten-gun" at her husband.

Immediately after reading this passage to the Assessors the learned trial Judge pointed out to them certain inconsistencies between that statement and her evidence at the trial, but did *not* point out the particular inconsistency to which we refer and which we regard as important. If the appellant had been carrying a Sten-gun we fail to see how he could have taken it out of his right hand trouser pocket as alleged by Mohamed Taib. In view of the defence — which was that Mohamed Taib had "framed" this case against the appellant — we attach considerable importance to this particular discrepancy and hold that the Assessors' attention should have been directed to it. We are unable to say that if this had been done, the Assessors would have expressed the same opinion.

For the above reasons we allow this appeal and quash the conviction and sentence.

Appeal Allowed.